IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

GIFT TAX REFERENCE No 2 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF GIFT-TAX

Versus

ARUNBHAI HARGOVANDAS PATEL

Appearance:

1. GIFT TAX REFERENCE No. 2 of 1987
MR BB NAIK for MR MANISH R BHATT for Petitioner No. 1
MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 25/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This is a reference made by the Income-tax Appellate Tribunal under Section 26 of the Gift Tax Act, 1958. At the instance of the revenue, the following question is referred for the opinion of this Court in respect of assessment year 1975-76:-

"Whether, on the facts and in the circumstances of the case, the assessee was liable to Gift-tax under the Gift-tax Act, 1958?"

2. We have heard Mr. B.B. Naik learned counsel for the revenue and Mr. M.J. Shah learned counsel for the respondent-assessee.

3. The assessee along with five others including assessee's brother was carrying on business in the name and style of M/s. Abadi & Co. under partnership deed dated 10-4-1971. The assessee had 22% share in the said firm while his brother had 15% share. As the assessee wanted to be a qualified Chartered Accountant, he retired from the said firm on 26-10-1973 i.e. at the end of S.Y. 2029 after withdrawing his capital from the firm. A new deed of partnership was executed on 16-11-1973 to carry on business w.e.f. 27-10-1973 i.e. the first day of S.Y. 2030. In the new firm, the assessee's mother became a partner with 17% share while the share of the assessee's brother was increased from 15% to 20%. On the aforesaid facts, the Gift Tax Officer asked the assessee to file his gift tax return. Along with nil return, the assessee sent a covering letter dated 23-1-1979 pointing out that he had withdrawn his capital from the firm and also contending that the assessee had to retire from the firm, as a practising Chartered Accountant cannot do any business. The Gift Tax Officer, however, held that the assessee had made a taxable gift of Rs.63,200/- in favour of his mother and brother and the amount was worked out on the basis of the value of the goodwill of the firm. The assessee carried the matter in appeal where the Commissioner of Gift Tax (Appeals) accepted the assessee's contention in view of the decision of this Court in Chhotalal Mohanlal 97 ITR 393 and other decisions following the said decision in Chhotalal Mohanlal (supra). The Tribunal dismissed the appeal filed by the revenue. Hence, this reference at the instance of the revenue.

4. Mr. B.B. Naik learned counsel for the revenue has submitted that the decision of this Court in Chhotalal Mohanlal has been reversed by the Supreme Court in (1987) 166 ITR 124 and, therefore, it must be held that the assessee had made a gift of the amount in

question in favour of the assessee's mother and brother. The learned counsel heavily relied on the principle laid down in the aforesaid decision that goodwill is property and when partners are introduced or minors are admitted to the benefits of partnership firm, share of an existing partner is reduced thereby and therefore the right to the money value of the goodwill stands transferred and the transaction constitutes a "gift" under the Gift Tax Act, 1958.

5. On the other hand, Mr. Manish J.Shah learned counsel for the respondent-assessee has submitted that since the assessee had withdrawn his capital from the firm, there was no question of any gift made by the assessee in favour of any other person. The assessee retired on 26-10-1973 and it was 20 days thereafter that the next partnership firm was constituted, albeit w.e.f. 27-10-1973 but it was not a case of any tripartite agreement where the retiring partner got any consideration from the incoming partners. In fact the assessee did not even know who were going to be the incoming partners as the sole reason for the assessee's retirement from the firm in question was that the assessee was going to be a practising Chartered Accountant and, therefore, he was prohibited from carrying on any business activity. The learned counsel for the assessee has also heavily relied on the decision of the Supreme Court in Commissioner of Gift Tax vs. T.M. Louiz (2000) 245 ITR 831. It is vehemently contended that the facts in the instant case are similar to the facts in the case of T.M. Louiz (supra) wherein the Apex Court has held that when a partner retires from a partnership, the partnership continues and the assets and the goodwill of the firm continue to remain the assets and the goodwill of the firm.

6. Having heard the learned counsel for the parties, we are of the view that there is considerable substance in the submissions made by the learned counsel for the assessee. There is no dispute about the fact that upon his retirement from the firm, the assessee withdrew the capital from the firm. Hence, it was not a case of the assessee making any gift of his capital in the firm in favour of his mother or brother. The only controversy was about the assessee's share in the goodwill. That is the only amount which the Gift Tax Officer quantified for levying gift tax. In the Commissioner of Gift Tax vs. T.M. Louiz 245 ITR 831, the Apex Court has in terms held as under:-

"The definition of "gift" makes it clear that

there has to be a transfer by one person to another of movable or immovable property such transfer has to be voluntary and without consideration in money or money's worth. What is, therefore, absolutely essential for the purposes of a gift is a transfer of property. "Transfer of property" is defined for the purposes of the Gift-tax Act as any disposition or conveyance, or assignment or settlement or delivery or payment or other alienation of property. The question, therefore, is whether, on the facts of the case at hand, there has been any such transfer of property.

To recapitulate, when the assessee retired from the two firms, he received the value of his shares therein and the argument was that what he had received was less than the market value of his shares since the goodwill of the firms had not been taken into account.

When a partner retires from the partnership, the partnership continues. The assets and the goodwill of the firm continue to remain the assets and the goodwill of the firm. All that the retiring partner gets is the value of his share in the partnership assets less its liabilities. It cannot, in such circumstances, be held, assuming that the retiring partner received less than what was his due, that the difference was something that he had transferred to the continuing partners within the meaning of "transfer of property" for the purposes of the Gift-tax Act or that there was a gift liable to gift tax."

(emphasis supplied)

7. The Apex Court has thus clearly laid down that when a partner retires from a firm, the partnership continues and the goodwill of the firm also continues to remain the goodwill of the firm. In the facts of the case, we are satisfied that there was no transfer of property from the assessee to his mother and brother as the goodwill of the firm M/s. Abadi & Co. continued to remain that of the firm notwithstanding the change of partners. We also find considerable substance in the submission made by the learned counsel for the assessee that the case of Chhotalal Mohanlal 166 ITR 124 is distinguishable on facts as in that case upon reconstitution of the firm, share of one of the

partners-assessee (Chhotalal -C) was reduced from seven annas in a rupee to four annas, as three anna share was given to assessee's minor sons who were admitted to the benefits of the partnership. "No alteration was, however, made regarding the share capital standing in the name of the assessee." Since no capital was contributed by the minor sons for getting that three anna share nor did the assessee receive any consideration from his minor sons for readjusting the shares of the respective parties in the aforesaid manner, the assessee had clearly made a gift to his minor sons of the three annas share and it was taxable.

8. Mr. Naik for the revenue vehemently submitted that even in the case of Chhotalal Mohanlal (166 ITR 124), the question considered was whether goodwill is property, and the Gift-tax Officer held it to be property, valued the goodwill of the firm in question and treated the relevant portion thereof as taxable gift; the Supreme Court confirmed that view and in terms held that goodwill is property and that with the admission of the two minors to the benefits of partnership in respect of a fixed share, the right of money value of the goodwill stood transferred and the transaction did constitute a gift under the Act.

9. Since in its subsequent decision in the case of T.M. Louiz (245 ITR 831) a three Judge Bench of the Supreme Court has considered and explained its earlier decision in the case of Chhotalal Mohanlal (Supra also by a three Judge Bench), it is not open to this Court to disregard the law laid down by the Apex Court in the case of T.M. Louiz (Supra) on the ground that the ratio of the decision in Chhotalal Mohanlal (Supra) is not correctly appreciated. As per the settled legal position, (two Full Bench decisions of this Court in Nizzamuddin Suleman, 1979 GLR 290 and Gujarat Housing Board vs. Nagjibhai, 1985(2) GLR 1190), if the views of the Supreme Court expressed in an earlier decision are explained in a subsequent decision of the Supreme Court, the explanation in the subsequent decision will have to be followed by the High Court, even if the subsequent decision is rendered by a smaller bench of the Supreme Court.

10. In view of the above principle, the decision in the case of Chhotalal Mohanlal (166 ITR 124) has to be understood as explained by the Supreme Court in its later decision in the case of T.M. Louiz (245 ITR 831) in the penultimate para of which the facts in Chhotalal's case are explained as under :-

"The judgment of this Court in Chhotalal Mohanlal's case (1987) 166 ITR 124, needs a brief explanation. When P retired, the firm was reconstituted, and C's minor sons were admitted to the benefits of the partnership with a three anna share; at the same time, C's share was reduced from seven to four annas. Necessarily, therefore, at a notional point of time just prior to the reconstitution a three anna share out of C's seven anna share in the partnership was transferred by C to his minor sons. There was, therefore, a gift by C to his minor sons of the three anna share, and it was taxable. The facts of the case before us are different and this judgment can be of no assistance."

11. The facts in the instant case are similar to those in the subsequent case of T.M. Louiz (Supra), as in both the cases the assessees are the outgoing partners who have admittedly taken back their share of the capital in the firm, unlike the assessee in the case of Chhotalal Mohanlal (Supra) who was the continuing partner who agreed to have his share in the properties of the firm reduced in favour of two minors admitted to the benefits of partnership without getting back a proportionate part of his share in the capital of the firm.

12. In view of the above discussion, we are of the view that the assessee was not liable to gift tax under the Gift-tax Act, 1958. Accordingly, our answer to the question is in the negative i.e. in favour of the assessee and against the revenue.

13. The Reference accordingly stands disposed of with no order as to costs.

(M.S. Shah,J)

(D.A. Mehta,J)

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